Whitesell Corporation *and* Glass, Molders, Pottery, Plastics and Allied Workers International Union, Local 359 Cases 18–CA–18143, 18–CA–18168, and 18–CA–18203

August 29, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On March 2, 2007, Administrative Law Judge Bruce D. Rosenstein issued the attached decision, finding that the Respondent had violated Section 8(a)(1) and (a)(5) in various respects. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

The judge found that the Respondent violated Section 8(a)(1) by prohibiting employees from distributing union meeting notices in the plant during their breaktime and separately violated Section 8(a)(1) by prohibiting the employees from distributing such notices during their unpaid time. Although the judge did not fully explain the basis for these findings, we agree that the Respondent violated Section 8(a)(1) by prohibiting distribution of union notices during breaktime.[4] It is well established that employees may distribute union materials during nonworking hours, such as breaktimes and lunch periods. See, e.g., *Republic Aviation v. NLRB,* 324 U.S. 793 (1945). The testimony of Human Resources Manager Betsy Milam, on which the judge relied, establishes that employees were precluded from distributing union notices on their breaktime. We, therefore, agree with the judge that Respondent's prohibition violated Section 8(a)(1). See *Tawas Industries*, 321 NLRB 269, 277 (1996).

We also agree with the judge that the Respondent violated Section 8(a)(1) by promulgating a policy prohibiting employees from posting union materials on the facility's bulletin boards. The Respondent does not dispute that the posting prohibition constituted the promulgation of a policy. Moreover, the record reflects no reason for the Respondent's posting prohibition other than that the postings were from the Union. In these circumstances, we find that the Respondent violated Section 8(a)(1). See *Honeywell, Inc.,* 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983) (respondent's policy discriminating against employer bulletin board postings based on their union-related nature violated Section 8(a)(1)).

The judge found that the Respondent violated Section 8(a)(5) of the Act by terminating the parties' existing collective-bargaining agreement and implementing parts of its final contract offer without first providing the requisite 8(d)(3) notice to the Federal Mediation and Conciliation Service (FMCS). In adopting the judge's finding of a violation, we reject the Respondent's argument, not addressed by the judge, that it did not violate the Act because it mailed the notice to the FMCS on March 2, 2006,[5]—3 months prior to the agreement's termination date—and thus was entitled to presume that the FMCS timely received the notice in the due course of mail. Assuming that the Respondent mailed the notice on March 2 and was entitled to presume that the FMCS timely received the notice, the judge found that the FMCS subsequently notified the Respondent, by letter, that it did not receive the 8(d)(3) notice until August 11. Under extant precedent, the FMCS letter rebuts any presumption that the agency timely received the notice. See *Chauffeurs Local 572 (Dar San Commissary)*, 223 NLRB 1003,

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] In the absence of exceptions, we adopt the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by denigrating the Union's representative and threatening bargaining futility and plant closure; and violated Sec. 8(a)(5) by prohibiting the Union from posting materials in the plant on June 13, 2006, failing to provide the Union with all postings on or after that date, and engaging in surface bargaining.

Further, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) by failing and refusing to process a series of grievances concerning the Respondent's June 13 unilateral changes and requesting a return to the status quo. In doing so, we have considered the Respondent's argument that it lawfully refused to process this specific class of grievances, but we nonetheless adopt the judge's finding of a violation as it is consistent with Board precedent. See *Martin Marietta Energy Systems,* 316 NLRB 868, 869 (1995) (respondent violated Sec. 8(a)(5) by failing to process grievances challenging unilateral changes in employees' working conditions).

[3] We have modified the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. We have also substituted a new notice for that of the judge.

[4] We thus find it unnecessary to pass on the judge's finding that the Respondent also violated Sec. 8(a)(1) by prohibiting distribution on employees' unpaid time, as such finding would be cumulative and would not materially affect the remedy.

[5] Unless otherwise stated, all dates are 2006.

1007 (1976). Moreover, the Respondent did not produce any probative evidence establishing actual delivery of the notice to the FMCS. In these circumstances, we agree with the judge that the Respondent violated Section 8(a)(5) by terminating the existing agreement without notifying the FMCS as required by Section 8(d)(3).[6]

The judge found that the Respondent violated Section 8(a)(5) by failing to provide information requested by the Union concerning layoff and recall, merit pay, retirement, vacation, and assignment of unit employees to perform work at the Respondent's new facility. We find that the information requested by the Union involving unit employees' terms and conditions of employment was presumptively relevant and necessary[7] and, with the exception of certain merit pay information[8] and the requests regarding layoff and recall and retirement, discussed below, we adopt the judge's findings.

At the bargaining table, the Respondent proposed that layoffs and recalls be conducted by evaluating the employees' seniority, as well as other criteria, such as skills, qualifications, and disciplinary record. The Union requested information on how each of the criteria would factor into a layoff or recall decision. The Respondent provided the Union with the layoff and recall evaluation form and stated that there was no formula for determining layoff and recall, but that any such decisions would be discretionary based on an evaluation of the Respondent's business needs and an evaluation of each employee's layoff and recall criteria rating. The Union did not subsequently renew its information request or otherwise indicate that it expected more information. Moreover, the judge did not identify any outstanding information requested by the Union. In these circumstances, we find, contrary to the judge, that the Respondent satisfied its duty to provide the information requested. See *Day Automotive Group,* supra at 1263 (respondent did not violate Sec. 8(a)(5) where it provided the union with the requested information and the union did not renew the information request or identify topics about which it needed more information).

The Union also requested information on the effect of the Respondent's proposed changes to its retirement plan. The Respondent sought the information requested by the Union from its plan provider, but did not receive the information until early October. The judge found that the Respondent violated Section 8(a)(5) because the information was requested in June. We disagree.

The Respondent did not have the requested information in June. See *Day Automotive Group,* supra at 1263 (respondent not expected to provide information it does not have). It provided the information to the Union as soon as it received it in October and there is no indication that this delay in providing the information was unreasonable. In this regard, the Respondent's uncontradicted testimony establishes that getting information from the plan provider was a time-consuming process because the provider required that the plan questions be submitted in writing. The Respondent then had to wait for the plan administrators to prepare a response to the questions, which was subject to several layers of review by the plan provider to ensure compliance with relevant legal and tax authority. In these circumstances, we reverse the judge's finding and conclude that the Respondent satisfied its 8(a)(5) duty to provide the information requested.

The judge found that the Respondent violated Section 8(a)(5) by unilaterally implementing certain provisions of its final offer on June 13 without first bargaining with the Union to a valid impasse. We adopt the judge's finding of a violation. In doing so, we particularly note that, although the Respondent sought substantial changes from the parties' existing agreement, it imposed an arbitrary deadline on the negotiations by stating that it intended to present its final offer by a specific date and engaged in only a limited number of bargaining sessions before declaring impasse. We also note that the Respondent declared impasse even though the parties exchanged proposals and reached agreements the day before and the

[6] Chairman Schaumber adopts the judge's finding of a violation based on the specific facts presented in this case.

[7] See *LBT, Inc.*, 339 NLRB 504, 505 (2003) (layoff and retention); *H. J. Scheirich Co*., 300 NLRB 687, 688 (1990) (merit pay); *International Protective Services*, 339 NLRB 701, 704 (2003) (retirement plan); *U.S. Family Care San Bernardino*, 315 NLRB 108 (1994) (vacation); and *Mercywood Health Building*, 287 NLRB 1114, 1124 (1988), enf. denied on other grounds 885 F.2d 341 (6th Cir. 1989) (relocation of unit employees).

[8] In adopting the judge's findings regarding merit pay information, we do so only as to certain information requested on July 17. Specifically, consistent with the Board's broad relevancy standard, the Respondent had an obligation to provide the Union with copies of the unit employees' practice merit pay evaluations and violated Sec. 8(a)(5) by failing to do so. In addition, because the Respondent consistently maintained that it intended to treat unit employees in the same manner as its nonunit employees at other facilities, the Union established that information requested regarding the administration of the merit pay plan to nonunit employees is relevant and necessary. See *E. I. du Pont & Co. v. NLRB*, 744 F.2d 536, 538 (6th Cir. 1984). The Respondent thus violated Sec. 8(a)(5) by failing to provide such information.

We reverse the judge's findings as to the other merit pay information requested. As to the June 6 request, the Respondent provided the Union with the merit pay evaluation form and explained that pay increases would be discretionary based on the evaluation score. Accordingly, we find that the Respondent satisfied its duty to provide the requested information. Regarding the July 17 requests not discussed above, the Respondent credibly testified that it did not have any supervisory training materials involving merit pay or any documents projecting labor costs. The Respondent is not obligated to provide information it does not have. See *Day Automotive Group*, 348 NLRB 1257, 1263 (2006).

day of the impasse declaration. Under similar circumstances, the Board has declined to find that a lawful impasse existed.[9] See *Newcor Bay City Division,* 345 NLRB 1229, 1238–1239 (2005) (no impasse where, e.g., respondent sought drastic changes, yet imposed the contract expiration date as an artificial deadline for negotiations, bargained for only a short period, and declared impasse at a time when the parties were reaching agreements on bargaining issues); accord: *Ead Motors Eastern Air Devices,* 346 NLRB 1060, 1063–1064 (2006).

We also adopt the judge's finding that the Respondent subsequently violated Section 8(a)(5) by unilaterally discontinuing dues checkoff prior to providing the FMCS with the appropriate 8(d)(3) contract termination notice. In finding this violation, the judge relied on *Petroleum Maintenance Co.,* 290 NLRB 462, 463 (1988). Under that extant precedent, although the dues-checkoff provision expired when the parties' existing agreement terminated on June 12, Section 8(d)(3) required the Respondent to maintain dues checkoff until September 10–30 days after it provided the requisite notice to the FMCS on August 11.[10] Id. at 463. We further adopt the judge's finding that the Respondent separately violated Section 8(a)(5) by unilaterally discontinuing the employees' supplemental accident insurance fund. See *Reapp Typographical Service,* 204 NLRB 792, 795 (1973).

The judge found that the Respondent violated Section 8(a)(5) by unilaterally changing its attendance policy. In doing so, the judge found that the Respondent did not dispute that it unilaterally implemented a 10-point system for evaluating attendance under its merit pay system. However, at the hearing and in its posthearing brief, the Respondent asserted that it did not implement a new attendance policy. Instead, the Respondent contended that the 10-point system was developed by supervisor Steve Hesseltine for his own personal use in rating his supervisees on the attendance factor of the Respondent's merit pay evaluation form. To establish a violation, the General Counsel must prove that the 10-point system constituted a substantial and material change in the employees' terms and conditions of employment. See, e.g., *Ferguson Enterprises,* 349 NLRB No. 57, slip op. at 1–2 (2007). The General Counsel did not, however, present any probative evidence establishing that the alleged system amounted to anything more than Hesseltine's informal, personal notations.[11] In these circumstances, we find that the General Counsel has not demonstrated a substantial and material change to the Respondent's attendance policy over which the Respondent was required to bargain. See *Associated Services for the Blind,* 299 NLRB 1150 (1990) (supervisor's personal notes regarding production written on employees' timecards did not constitute a change in work rules significant enough to require bargaining). Accordingly, we reverse the judge's finding of a violation.

ORDER

The Respondent, Whitesell Corporation, Washington, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating its collective-bargaining agreement with the Union and making unilateral changes in terms and conditions of employment without giving the proper notice required by Section 8(d)(3) of the Act.

(b) Unilaterally changing terms and conditions of employment of unit employees by implementing certain provisions of its final contract without having first bargained with the Union in good faith to impasse.

(c) Unilaterally discontinuing its supplemental accident insurance fund.

[9] In adopting the judge's finding of this violation, Chairman Schaumber finds it unnecessary to rely on the judge's conclusion that the parties were not at a good faith impasse because the Respondent failed to provide the Union with certain information it requested during the course of bargaining.

Further, it appears from his recommended Order that the judge found that the Respondent separately violated Sec. 8(a)(5) by unilaterally implementing changes to its medical insurance, wage evaluation system, and 401(k) plan. However, these changes were some of the provisions of its final offer the Respondent unilaterally implemented after unlawfully declaring impasse on June 12. We thus find that separate reference to these changes in the Order is unnecessary and we modify the Order accordingly.

[10] In Member Liebman's view, dues-checkoff provisions, like other contractually established terms and conditions of employment, survive the expiration of an agreement and continue until the parties reach a new agreement or a valid impasse. See her dissenting opinion in *Hacienda Resort Hotel & Casino*, 351 NLRB No. 32 (2007) (Board affirmed conclusion reached in 331 NLRB 665 on alternative grounds). For institutional reasons, however, she agrees to apply the extant precedent in *Petroleum Maintenance* and find that the Respondent was required to maintain dues checkoff only until 30 days after providing the FMCS with the requisite 8(d)(3) notice.

The Respondent contends that *Petroleum Maintenance* should be overruled because it is inconsistent with circuit court precedent, holding that a failure to adhere to the 8(d)(3) notice requirements does not serve to extend the terms of an agreement. However, the cases cited by the Respondent involve situations where the union claimed that the employer's failure to provide the requisite 8(d)(3) notice rendered an attempt to terminate an agreement ineffective, not situations, such as here and in *Petroleum Maintenance*, where the union merely asserts that the employer violated Sec. 8(a)(5) by failing to maintain the terms of the agreement until it provided the requisite 8(d)(3) notice.

[11] In his posthearing brief, the General Counsel asserts that Hesseltine told Georgia Fort, a unit employee and the local Union's president, that the 10-point system was "new" and that he had discussed it with the facility's general manager. The judge did not, however, rely on Fort's testimony in this regard, and we find it not to be probative as it is uncorroborated hearsay.

(d) Refusing to accept and process grievances filed by the Union in accordance with the procedures set forth in the expired 2006 contract with the Union.

(e) Prohibiting employees from distributing union meeting notices in the plant during their breaktime.

(f) Implementing a policy prohibiting the employees from posting union materials on the facility's bulletin boards.

(g) Refusing to provide necessary and relevant information to the Union.

(h) In any like or related matter interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive bargaining representative of the employees in the following unit:

> All full-time and regular part-time production and maintenance employees employed at its plant in Washington, Iowa, excluding office and clerical employees, salesmen, professional employees, guards, supervisory and managerial employees as defined in the National Labor Relations Act.

(b) On request, rescind the unlawful changes since June 13, 2006, and restore, honor, and continue the terms and conditions of the contract with the Union that was set to expire on June 12, 2006, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse.

(c) Make any employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Reimburse the Union for all membership dues which the Respondent failed to withhold and transmit to the Union prior to September 10, 2006, pursuant to the signed dues-deduction authorizations, with interest.

(e) On request, process the grievances at issue in this proceeding in accordance with the procedures set forth in the expired 2006 contract with the Union.

(f) On request, furnish to the Union in a timely manner the information requested concerning vacation, merit pay, and assignment of unit employees to the new facility on June 9, July 17, and August 9, 2006.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Washington, Iowa, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 9, 2006.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 29, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate our collective-bargaining agreement with the Union and make unilateral changes in terms and conditions of employment without giving the proper notices required by Section 8(d)(3) of the Act.

WE WILL NOT make unilateral changes in wages, hours, and other terms and conditions of employment of our employees without having first bargained with the Union in good faith to a bona fide impasse.

WE WILL NOT unilaterally discontinue the supplemental accident insurance fund.

WE WILL NOT refuse to process grievances in accordance with the procedures set forth in the expired 2006 contract with the Union.

WE WILL NOT prohibit employees from distributing union meeting notices in the plant during their breaktime.

WE WILL NOT promulgate a policy prohibiting employees from posting union materials on the facility's bulletin boards.

WE WILL NOT refuse to provide necessary and relevant information to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following unit:

All full-time and regular part-time production and maintenance employees employed at its plant in Washington, Iowa, excluding office and clerical employees, salesmen, professional employees, guards, supervisory and managerial employees as defined in the National Labor Relations Act.

WE WILL, on request, rescind the unlawful changes since June 13, 2006, and restore, honor, and continue the terms and conditions of the contract with the Union that was set to expire on June 12, 2006, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse.

WE WILL make any employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL reimburse the Union for all membership dues which we failed to withhold and transmit to the Union prior to September 10, 2006, pursuant to the signed dues-deduction authorizations, with interest.

WE WILL, on request, process any grievances filed by the Union in accordance with the procedures set forth in the expired 2006 contract with the Union.

WE WILL, on request, furnish to the Union in a timely manner the information requested concerning vacation, merit pay, and assignment of unit employees to the new facility on June 9, July 17, and August 9, 2006.

WHITESELL CORPORATION

Nichole L. Burgess-Peel, Esq. and *James L. Fox, Esq.,* for the General Counsel.

Charles P. Roberts III, Esq., of Winston-Salem, North Carolina, and *David A.Tomlinson, Esq.,* of Muscle Shoals, Alabama, for the Respondent-Employer.

Jay M. Smith, Esq., of Sioux City, Iowa, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on January 9 through 11, 2007, in Washington, Iowa, pursuant to a consolidated complaint and notice of hearing in the subject cases (the complaint) issued on November 28, 2006,[1] by the Regional Director for Region 18 of the National Labor Relations Board (the Board). The underlying charges were filed on various dates in August, September, and October 2006 by Glass Molders, Pottery, Plastics and Allied Workers International Union Local 359 (the Charging Party or the Union) alleging that Whitesell Corporation (the Respondent or the Employer) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent engaged in a number of independent violations of Section 8(a)(1) of the Act including threatening that bargaining was futile, informing employees that the plant may not remain in Washington, Iowa, if they continued to support the Union and prohibiting employees from distributing union meeting notices in the plant during there break and unpaid time. The complaint further alleges that the Respondent engaged in a number of violations of Section 8(a)(1) and (5) of the Act by refusing to provide necessary and relevant information to the Union, unilaterally implementing a number of mandatory subjects of bargaining without notice or affording the Union an opportunity to bargain absent an overall impasse in good-faith bargaining and failing under Section 8(d)(3) of the Act to provide timely notice of the existence of a dispute to the Federal Mediation and Conciliation Service (FMCS).

[1] All dates are in 2006, unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the manufacture and distribution of wire form products as its plant in Washington, Iowa, where it annually purchases and receives goods valued in excess of $50,000 from points located directly outside the State of Iowa. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

On or about January 1, 2005, Respondent purchased the assets of Fansteel Washington Manufacturing, Inc. It recognized the Union and assumed the existing collective-bargaining agreement, which was effective by its terms from June 13, 2002, to June 12.

On or about March 2, the Respondent served written notice on the Union of its intention to terminate the parties' collective-bargaining agreement upon its expiration.

The parties commenced negotiations for their initial collective-bargaining agreement on May 26, and the Respondent notified the Union during this session of its intent to present a final contract offer to the Union on June 8 or 9. The parties, thereafter, engaged in eight bargaining sessions when the Respondent declared that they were at impasse on June 12.[2]

On June 13, Respondent implemented certain provisions of its final offer.[3] The Union did not consent to implementation.

Respondent's chief negotiator was Robert Janowitz and the Union's chief negotiator was Dale Jeter. At all material times, Robert Wiese served as Respondent's chief operations officer while David Tomlinson held the position of the general counsel. Cris Libera held the position of corporate human resources director until November 22, while Betsy Milam served as the human resources manager at the Washington, Iowa facility. Employee Georgia Fort held the position of union president and served along with employee Mary Westfall on the Union's bargaining committee.

By letter dated April 17, Janowitz informed the Union that while the Respondent is willing to consider some language from the current agreement, it intends to negotiate a new agreement from start to finish. Additionally, the letter stated that the Respondent is not interested in extending negotiations past the expiration date of the current agreement (GC Exh. 16).

On May 26, at the parties' first negotiation session, Janowitz stated that the Respondent's plan is to reach a tentative agreement or give its final proposal no later then Friday, June 9. He further stated that the Respondent did not intend to treat Washington, Iowa facility employees any different from the 400–500 employees in the corporation, 95 of which were in the bargaining unit, and they were going to be consistent in applying common policies, procedures, and terms and conditions of employment to all employees.

B. The 8(a)(1) Allegations

The General Counsel alleges in paragraphs 5(a)–(e) of the complaint that the Respondent engaged in a number of violations of the Act.

1. Allegations concerning Robert Wiese

The General Counsel asserts in paragraph 5(a) of the complaint that Wiese on about June 13, in meetings with employees, denigrated Union Representative Jeter and threatened that bargaining was futile by referring to the closure of another plant where employees were represented by a union.

The General Counsel called three employees to support this allegation. Julie Mesenger stated that she, along with approximately 75 other first-shift employees, attended a meeting on June 13, around 9:30 a.m. on the shop floor, where Wiese apprised those in attendance that the Respondent had just implemented portions of its final contract offer. Wiese informed the employees of some of the significant changes including an immediate 25-cent-an-hour raise for all employees, those with 10 years or more of continuous employment would not have to pay for their health insurance but those employees with less then 10 years would see an increase in their insurance premiums. Wiese also told the employees that their vacation entitlement would be subject to a new formula and their 401(k) plan matching benefits would be reduced. According to Mesenger, Wiese said, "Where is Dale Jeters, I don't see Dale Jeters here." She had no further recollection of Wiese saying anything else about Jeter or referring to any other facilities being closed because of Jeter or the Union.

Fort, who also attended the same meeting as Messenger, confirmed that Wiese reviewed portions of Respondent's implemented final contract offer during his presentation. She testified that Wiese stated, "Where was Mr. Jeters, was he at the other empty factory across town over at Crane or Calendar or was he somewhere else shutting a place down?"

Westfall, who was also present at the June 13 meeting, testified that Wiese stated, "Where Dale Jeters was that day, is he at the old Calendar factory or is he at Crane or somewhere else closing a factory?"

Wiese admitted in his testimony that he conducted two separate meetings with the employees on June 13 to review the

[2] The parties met on May 26 from 9 a.m. to 12 noon; on June 6, from 8:30 a.m. to 3 p.m.; on June 7, from 9:45 a.m. to 4:10 p.m.; on June 8, from 9:40 a.m. to 5:30 p.m.; on June 9, from 9:40 a.m. to 6 p.m.; on June 10, from 10:05 a.m. to 6:20 p.m.; on June 11, from 10:15 a.m. to approximately 4 p.m.; and on June 12, from 8:30 a.m. to 1 p.m.

[3] Art. 8, Disciplinary Action, Sec. 8.1; art. 9, Probationary Period of Employment, sec. 9.1; art. 10, Seniority, sec. 10.1 and 10.5; art. 11, Applicability of Personnel Policies; art. 12, Work Hours/Overtime; art. 13, Holidays; art. 14, Vacation; art. 15, Bereavement Pay; art. 16, Rest Periods; art. 18, Leaves of Absence and Sick Leave; art. 19, Group Insurance; art. 20, Jury Duty and Witness Duty; art. 21, Drug Testing; art. 22, Wage Rates and Night Shift Differential; art. 23, Personal Protective Equipment; art. 24, Safety; art. 26, Retirement Plan; art. 27, Military Leave; art. 28, Tuition Reimbursement; and art. 29, Credit Union.

recently implemented portions of the Respondent's final contract offer. He discussed issues such as the wage increase and shift premiums that employees would immediately see in their pay checks and reviewed some of the adverse changes that employees could expect in their health insurance, holiday pay, and vacation entitlement. During the course of the meeting, Wiese admits that he stated, "I am here today, where is Dale Jeter today?" He testified that he made no comments about the Calendar or Crane factories during his presentation on June 13. Rather, he asserts that he held a second set of meetings with employees on August 29 and 30 to discuss some labor relations issues including a recently filed unfair labor practice charge and the status of a decertification petition that was also filed. During the meeting, Wiese read portions of a letter that Jeter had recently sent him. He told the employees that he thought Jeter was the union representative for the Calendar and Crane factories and that you know him. One of the employees attending the meeting said Jeter was not the union representative at the Calendar factory and another employee stated that it does not matter because both of those plants were shut down because of Unions.

Tomlinson, who likewise attended the June 13 meeting, testified that Wiese stated during the course of the meeting that "I'm here today, where is Dale Jeter?" He asserts that nothing was stated about Jeter and the Calendar or Crane factories during this meeting. Tomlinson, also attended the August 29 and 30 meetings and testified that Wiese said, "You know Dale Jeter, he is the international representative for the GMP and also for the Calendar and Crane factory." Tomlinson asserts that one of the employees at the meeting stated that Jeter was not the representative at the Calendar factory and another employee said it does not matter because they are closed now too because of the Union.

Based on the above recitation, I find that Wiese did not make the statement that bargaining was futile or denigrate Jeter as alleged in paragraph 5(a) of the complaint. In this regard, I note that of the 75 employees who attended the June 13 meeting, the General Counsel only called 3 employees to testify about this allegation. One of the employees did not confirm that Wiese connected Jeter with the closing of the Calendar or Crane factories and did not testify that Wiese threatened that bargaining was futile. The other two employees, while alluding to the connection of Jeter and the closing of those two factories never testified that Wiese stated that bargaining was futile when referring to the closure of the Calendar and Crane facilities. Moreover, none of the General Counsel's witnesses testified about the August 29 and 30 meetings, when a discussion of the Calendar and Crane facilities occurred. Further, the General Counsel did not elicit any testimony to refute the Respondent's assertions of what was discussed at the August 29 and 30 meetings.

For all of the above reasons, I am not convinced that Wiese denigrated Union Representative Jeter at the June 13 meeting or threatened that bargaining was futile by referring to the closure of either the Calendar or Crane facilities where employees were represented by a union.

Therefore, I recommend that the allegations in paragraph 5(a) of the complaint be dismissed.

The General Counsel alleges in paragraph 5(b) of the complaint that during the same meeting as referred to in paragraph 5(a) of the complaint, Wiese threatened employees that the plant may not remain in Washington, Iowa, if they continued to support the Union.

Mesenger testified that a comment was made that the Respondent was not going to move and probably would stay in Washington, Iowa. She did not testify that Wiese threatened employees that the plant may not remain in Washington, Iowa, if they continued to support the Union. Neither Fort nor Westfall testified that Wiese threatened employees by stating that the plant may not remain in Washington, Iowa, if they continued to support the Union. Rather, both of these employees testified that a fellow employee asked Wiese, during the meeting, whether the plant will remain in Washington. Wiese replied, according to Fort, that it was up to us and Westfall testified that Wiese stated in response to the same question, that it depended on the people.

Neither Wiese nor Tomlinson were asked questions about this allegation during the course of there testimony.

Based on the forgoing, I am not convinced that Wiese made the statements alleged in the complaint by the General Counsel. None of the General Counsel's witnesses testified that Wiese stated that the plant might not remain in Iowa if the employees continued to support the Union nor did they confirm that Wiese threatened employees. Rather, it appears that a coworker inquired of Wiese whether the plant would remain in Washington, Iowa, and he replied that it is up to us or that it depended on the people. This statement is vague and can be subject to numerous interpretations. In any event, the jump that if employees continue to support the Union the plant may not remain in Washington, Iowa, is not supported by the testimony of the General Counsel's witnesses.

Accordingly, I recommend that the allegations in paragraph 5(b) of the complaint be dismissed.

2. Allegations concerning Betsy Milam

The General Counsel alleges in paragraphs 5(c), (d), and (e) of the complaint that Human Resources Manager Betsy Milam, on about July 27, prohibited an employee from distributing union meeting notices in the plant during either the employee's unpaid or breaktime. Additionally, the General Counsel alleges that during the same conversation, Milam promulgated a policy prohibiting employees form posting any union materials in the plant.

The evidence discloses that the Respondent has three bulletin boards at the plant. One of the bulletin boards is glass enclosed while the other two are located by the timeclocks and are uncovered. Prior to November 2006, employees had unfettered access to the two uncovered bulletin boards and could post notices at will without seeking permission to do so. Examples of such notices include items for sale, recipes, bake sales, or local information of interest. The Union was permitted to post materials on either of the two uncovered bulletin boards and on occasions, did so.

Fort testified that due to an upcoming union meeting on July 31, she asked Milam whether she could post a written notice of the meeting on the bulletin board (GC Exh. 59). Milam stated

that she would check with headquarters in Alabama and later informed Fort that she could not post the notice on the bulletin board.

Milam testified that on July 27, Fort inquired of her whether she could post a union notice on the bulletin board. Milam informed Fort that she could not post the notice on the bulletin board but could pass out the notice on her unpaid time.

Washington, Iowa, Plant Manager Misty Bruders testified that prior to November 2006, employees were free to post notices on the two uncovered bulletin boards without seeking permission. In November 2006, due to a notice that was posted on one of the bulletin boards that had the perception of being insensitive to certain employees, Bruders promulgated a policy that all postings without exception must be approved by her including for sale items, bake sales and menus (GC Exh. 60). Bruders admitted that this policy was undertaken without notice or bargaining with the Union.

Based on Bruders testimony, it is apparent that prior to November 2006, employees had an unfettered right to post materials on the two uncovered bulletin boards and did not need permission to do so. Such notices included items for sale, menus, or other matters of local interest to employees. Accordingly, when Fort sought to post a notice announcing an upcoming union meeting and was precluded from doing so, despite the presence of other notices posted on the two bulletin boards, the Respondent engaged in disparate treatment. Such a policy precluding the posting of union notices, when other notices of general interest are permitted to be posted interferes with Section 7 rights under the Act.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act when it prevented Fort from posting a notice on the bulletin board to announce an upcoming union meeting on her unpaid or breaktime. Additionally, by establishing such a policy, when other employees had unfettered access to post general notices on the bulletin boards without seeking permission, the Respondent also violated the Act. *Publix Super Markets,* 347 NLRB 1433 (2006).

Therefore, the allegations in paragraphs 5(c), (d), and (e) of the complaint are sustained.

C. The 8(a)(1) and (5) Allegations

1. Allegations concerning FMCS

The General Counsel alleges in paragraph 11 of the complaint that the Respondent failed to provide notice of the existence of a dispute to the FMCS within 30 days of its notification to the Union that it intended to terminate the parties' collective-bargaining agreement upon its expiration.

a. Facts

By letter dated March 2, Respondent notified the Union of its intent to terminate the parties' collective-bargaining agreement upon its expiration and apprised the Union that it sent a copy of the enclosed F-7 notice to the FMCS (GC Exh. 4). Libera testified that she signed the F-7 notice and placed it in an envelope addressed to the FMCS that was stamped with the Respondent's postal meter. Libera then placed the letter in the United States mail. She acknowledged, however, that the letter was sent by regular mail rather then registered or certified mail, but the Respondent never received the letter back from the postal service as undeliverable to the FMCS.

Both Jeter and Janowitz, during the parties' June 8 collective-bargaining session, commented that it was unusual that neither of them had been contacted by a mediator from the FMCS prior to the commencement of their negotiation sessions.

Jeter testified that after the expiration of the parties' collective-bargaining agreement and the implementation of the Respondent's final contract offer, he contacted the FMCS on July 10, to discern if they had knowledge of the dispute between the parties (GC Exhs. 5, 6, and 7).

By letter dated August 10, Jeter apprised the Respondent that the FMCS informed him that it has no record of receiving the required F-7 notice that the parties' collective-bargaining agreement was open for negotiations (GC Exh. 8). Jeter requested the Respondent to provide proof that it properly and timely filed the required notice with the FMCS.

By letter dated August 17, Tomlinson informed Jeter that the Respondent not only provided the required notice to the Union but simultaneously filed the notice with the FMCS by depositing it in the United States mail (GC Exh. 9). Tomlinson further apprised Jeter that on August 10, the Respondent sent a courtesy copy of the March 2 letter and notice to the FMCS. By e-mail dated August 17, Jeter challenged Tomlinson's assertion that the Union's request for proof has been satisfied (GC Exh. 10).

By fax transmission dated August 22, Tomlinson sent the FMCS another copy of its August 10 letter and the F-7 notice that it previously sent on March 2 (R Exh. 3).

By letter dated September 21, the FMCS notified the Board that it had no record of receiving an F-7 notice from the Respondent in or about March 2006. The FMCS informed the Board that it had received two F-7 notices from the Respondent dated August 11 and 22 (GC Exh. 13).

b. Analysis

Section 8(d), in defining the duty to bargain collectively, includes notice requirements that must be satisfied prior to termination or modification of a labor contract. Section 8(d)(1) requires that the party desiring termination or modification of the agreement must serve upon the other party to the contract a written notice of the proposed termination or modification 60 days prior to the expiration date of the agreement, or in the event such contract contains no expiration date, 60 days prior to the time it is proposed to make such a termination or modification. Section 8(d)(3) provides that the party desiring to terminate or modify the agreement must notify the FMCS within 30 days after such notice of the existence of a dispute. *Amax Coal Co. v. NLRB,* 614 F.2d 872 (3d Cir. 1980), revd. on other grounds 453 U.S. 322 (1981) (failure to provide written notice to FMCS violative of Sec. 8(d)(3), despite FMCS actual knowledge of the dispute).

The Board now holds that the burden of notifying the mediation service of a dispute under Section 8(d)(3) rests exclusively with the initiating party and that the initiating party's failure to file such a notice does not preclude the noninitiating party from undertaking otherwise lawful economic action. Thus, in *Nabors Trailers,* 294 NLRB 1115 (1989), affd. in part 910 F.2d

268 (5th Cir. 1990),[4] the Board held that the employer unlawfully implemented its wage reduction proposal without giving FMCS notice required by the Act because the employer was the initiating party in opening talks pursuant to the contract's provisions for notice and termination.[5]

The Respondent argues that it made a good-faith effort and took all reasonable steps to satisfy the 8(d)(3) requirements by filing the required F-7 notice with the FMCS. Indeed, it established that it prepared the appropriate form and deposited same in the United States mail on March 2, while simultaneously sending the required notice to the Union by fax transmission. Thus, it opines that the Union was on notice of the Respondent's intent that a dispute existed between the parties and it intended to terminate the parties' collective-bargaining agreement upon its expiration.

The Board has held, however, that to be effective such notice must actually be received. *Freeman Decorating Co.,* 336 NLRB 1, 3–4, 39 fn. 26 (2001); *Ohio Oil Co.,* 91 NLRB 759, 761 (1950).

There is no dispute that the Respondent did not mail the required FMCS form by certified or registered mail, return receipt requested nor did it make any effort to ascertain whether the notice was actually delivered to the FMCS. Moreover, the letter on FMCS stationery dated September 21, and signed by a representative of that agency, shows that the required F-7 notice was not received in or about March 2006 nor was it on file.[6] The September 21 letter confirms that two FMCS forms were received from the Respondent on August 11 and 22. These notices, however, do not comply with the requirements of Section 8(d)(3) because the Respondent did not notify the FMCS within 30 days after serving the 60-day notice on the Union, as required.

Therefore, in agreement with the General Counsel, I find that the Respondent has engaged in unfair labor practices within the meaning of Section 8(d)(3), thereby violating Section 8(a)(1) and (5) of the Act. *Petroleum Maintenance Co.,* 290 NLRB 462 (1988). Under these circumstances, it was incumbent upon the Respondent to continue in full force and effect all the terms and conditions of the parties' existing collective-bargaining agreement pursuant to Section 8(d)(4) of the Act.

[4] Accord: *NLRB v. Mar-Len Cabinets,* 659 F2d 995 (9th Cir. 1981), enfg. in relevant part 243 NLRB 523 (1979), on remand 262 NLRB 1398 (1982) (employer that failed to give required 8(d)(3) notice violated Sec. 8(a)(5) by unilateral changes after impasse in bargaining), the Board held that the employer unlawfully implemented its wage reduction proposal without giving FMCS notice required by the Act because the employer was the initiating party in opening talks pursuant to the contract's provisions for notice and termination.

[5] See also *Z-Bro, Inc.,* 300 NLRB 87 (1990). In *Mar-Len Cabinets,* 243 NLRB 523, the employer unilaterally implemented its bargaining proposals after failing to comply with Sec. 8(d)(3). Its mistaken reliance on the union's alleged compliance with the notice requirements was held no defense.

[6] The General Counsel, by letter dated December 14, informed Respondent of its intent to offer the letter pursuant to FRE 807. The FMCS letter gives a guarantee of trustworthiness and the interests of justice will be served by relying on its contents. *Chauffeurs Local 572,* 223 NLRB 1003, 1008 (1976).

2. Allegations concerning requests for information

The Board explained in *Asarco, Inc.,* 316 NLRB 636, 643 (1995), enfd. in relevant part 86 F.3d 1401 (5th Cir. 1996), that:

> In dealing with a certified or recognized collective-bargaining representative, one of the things which employers must do, on request, is to provide information that is needed by a bargaining representative for the proper performance of its duties. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967). Following an appropriate request, and limited only by considerations of relevancy, the obligation arises from the operation of the Act itself. *Ellsworth Sheet Metal,* 224 NLRB 1506 (1976). In each case, the inquiry is whether or not both parties meet their duty to deal in good faith under the particular facts of the case. *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1973). The legal standard concerning just what information must be produced is whether or not there is "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Bohemia, Inc.,* 272 NLRB 1128 (1984).

The General Counsel alleges in paragraph 13(a) of the complaint that about June 7, the Union verbally requested that the Respondent provide it with information regarding the criteria it intended to use to determine employee layoff and recall.

The parties' existing agreement established that seniority would prevail insofar as layoff, rehire, and choice of vacation dates are concerned (GC Exh. 3, art. 11). During the parties June 6 collective-bargaining session, Janowitz informed the Union that the Respondent did not intend to be bound by seniority for its layoff and recall procedures. Rather, the Respondent proposed that seniority would be a factor to be considered with respect to the layoff and recall of bargaining unit employees, as are other appropriate criteria such as, but not limited to, skills, qualifications, abilities, attendance record, tardiness record, disciplinary record, and team work. Where all appropriate criteria are relatively equal, seniority for the purposes noted will prevail (GC Exh. 38, art. 10 and GC Exh. 56, art. 11).

a. Facts

During the June 6 collective-bargaining session, and after Janowitz confirmed that the Respondent intended to rely on other factors besides seniority in the layoff and recall procedures for employees, both Jeter and Fort requested information with respect to how the criteria would be applied and relied upon by the Respondent. Jeter requested information on how supervisors would rate employee qualifications and abilities, apply there attendance, tardiness, and disciplinary record to reach a consensus on how to differentiate between employees. Jeter explained to the Respondent that this was an entirely new approach for determining which employees would be laid off and recalled and a thorough explanation and analysis of these criteria was necessary before the Union could totally comprehend the proposal and commence meaningful negotiations.

The Respondent takes the position that the parties were miles apart on this issue and the Union steadfastly refused to com-

promise its long-term position that seniority must control when considering layoff and recall procedures for employees.

b. Analysis

The record discloses that the Respondent did not make a good-faith effort to independently explain to the Union how it would apply the criteria that it intended to rely upon when considering employees for layoff and recall. It must be noted that the Respondent's proposal on layoff and recall was a dramatic change from the practice the parties had followed for many years. Moreover, the discussion on this issue occurred on June 6, a mere 6 days before the Respondent declared impasse and implemented numerous contract articles including its final contract offer covering seniority. The subject information request went to the core issues that the parties were discussing and the information should have been provided to the Union prior to the Respondent's declaration of impasse on June 12.

Accordingly, I find that the Respondent's refusal to provide the Union with detailed information in response to its June 6 oral request, is violative of Section 8(a)(1) and (5) of the Act.

The General Counsel alleges in paragraphs 13(b) and 17(a) of the complaint that about June 7, the Union verbally, and again on July 17 in writing, requested information regarding the criteria proposed to use in evaluating employees in Respondent's evaluation system and how Respondent proposed to determine employees wage rates under its merit wage proposal.

The past practice of the parties was to negotiate structured across the board wage increases for employees. For the first time, the Respondent proposed to institute a merit wage system with an annual written performance evaluation for each employee on or about their anniversary date as the sole factor to determine wage increases.

(1) Facts

The newly proposed evaluation system was presented to the Union during the parties June 7, collective-bargaining session. The evidence shows that the evaluation system had been in effect for supervisory and managerial employees of the Respondent for at least 11 years and for its hourly nonunion employees for the last 3 years. The Union had numerous questions about the impact of such a system on employees' terms and conditions of employment. For example, the Respondent presented the Union with a proposed employee performance evaluation form that listed 15 personal traits with 5 possible factors on a numerical rating of 0–4.[7] The Union pointed out inconsistencies with the Respondent's proposal and the factors listed in the employee performance evaluation form and sought answers to there questions. In addition, the Union sought a list of employees in each job classification at other Respondent facilities and a copy of other hourly employees' evaluations, redacted, so they could evaluate how other supervisors had applied the personal traits on the evaluation form to other similarly situated employees. The Union, on July 17, submitted a six-page letter to the Respondent detailing with specificity there concerns regarding the Respondent's proposed evaluation system and outlined additional requests for information to assist the Union in making comprehensive counterproposals on this significant issue (GC Exh. 30).

The Respondent, during the June 7 collective-bargaining session, provided a number of responses to the Union's oral questions about the newly proposed evaluation system. However, it was not able to respond in detail to each and every question. Some of these questions and answers are set forth in the Union's July 17 letter.

By letter dated September 19, the Respondent provided a number of answers to the Union regarding the evaluation system, but it did not address each and every request for information that the Union made orally and later in writing (GC Exh. 31). For example, the Respondent declined to provide copies of evaluations for employees at the Washington, Iowa facility, based on the fact that these were practice session evaluations. However, the record evidence shows that evaluations did occur and supervisory meetings to discuss them took place with employees (GC Exhs. 63 and 64). Likewise, the Respondent declined to provide appraisals for other similarly situated employees at other facilities despite the Union's agreement to have the name of the employee and supervisor redacted.

(2) Analysis

Based on the record evidence and the testimony of the parties, it is evident to me that the while the Respondent made an effort to respond to some of the Union's questions concerning the evaluation system and its impact on the determination of wage increases for employees, it only provided cursory responses and did not fully respond to the Union's relevant requests for information. It must be noted that the subject of a newly introduced evaluation system for employees, who have not previously been formally evaluated, is a stark and dramatic change. Thus, moving to such a system had to be thoroughly evaluated by the Union before any agreement could be reached. To raise a number of questions and request information on such a dramatic change in conditions of employment, and particularly noting that the request immediately followed the June 7 presentation of the proposal, deserves a comprehensive response by the Respondent. In finding that the Respondent did not fully respond to or provide all of the information requested, I also note that after the Respondent implemented the evaluation system on June 13, and commenced practice evaluations for employees in July and August 2006, a number of supervisors changed the rating factors from a scale of 0–4 to a scale of 1–10. Thus, the Respondent's final contract proposal provided to the Union during negotiations was unilaterally changed after June 13.

For all of the above reasons, I find that the Respondent did not fully and completely provide the necessary and relevant information concerning the criteria Respondent proposed to use in evaluating employees and how it proposed to determine employee wage rates, to the Union.

Accordingly, I conclude that the General Counsel sustained the allegations in paragraphs 13(b) and 17(a) of the complaint,

[7] The personal traits included knowledge, quantity, accuracy, judgment, innovation, appearance and habits, orderliness, courtesy, cooperation, initiative, reliability, perseverance, stability, attendance, and alertness. The rating factors included unsatisfactory (0), some deficiencies evident (1), satisfactory (2), exceptional (3), and clearly outstanding (4).

and therefore, Respondent violated Section 8(a)(1) and (5) of the Act by not providing necessary and relevant information to the Union.

The General Counsel alleges in paragraph 13(c) of the complaint, as amended at the hearing that about June 7, the Union verbally requested that Respondent provide it with information regarding vesting and the ability of employees to rollover loan balances under its proposed retirement plan, and on June 12, in writing, requested information on Respondent's proposed retirement plan.

The retirement plan that previously existed in the parties' collective-bargaining agreement was a defined contribution plan with a match of 84 cents for each hour worked by the employee. The Respondent proposed to change the existing retirement plan and wanted all employees to participate in the Respondent's current 401(k) plan with a match of 25 percent of an eligible employee's contribution up to 8 percent of annual compensation and a 6-year vesting schedule. When comparing both plans, the newly proposed 401(k) retirement plan was less generous that the previous plan.

(3) Facts

During the parties June 7, collective-bargaining session, the Union requested information on the Respondent's newly proposed retirement 401(k) plan specifically seeking answers about the ability of employees to rollover loan balances and whether employees would be vested in the new retirement plan. While the Respondent provided some answers, it did not have the specific answers to questions concerning vesting and how loan balances would be treated. By letter dated June 12, the Union confirmed that the Respondent had not provided information to its questions regarding the Respondent's retirement plan proposals and it needed the information to offer counter proposals at the next bargaining session (GC Exh. 32).

On or about October 5, the Respondent provided comprehensive information regarding the Respondent's group 401(k) plan to employees in an attachment to their paychecks (GC Exh. 62). In pertinent part, the announcement confirmed that on June 13, the 401(k) plan was not ready to receive all the participants and the Employer allowed the employees that were under the old retirement plan to keep contributing temporarily to that plan until the new retirement plan was ready for them to be rolled over. In a portion of the announcement the Respondent specifically responded, in question and answer fashion, to issues concerning the roll over of existing loans under the old plan and what it means when you are 100-percent vested.

(4) Analysis

Based on the forgoing, it is apparent that there were outstanding requests for information on June 7 and 12, regarding the ability of employees to rollover loan balances under the Respondent's newly proposed group 401(k) plan and on vesting in the new plan. Indeed, specific answers were not provided to the Union and the employees until October 5.

Contrary to the Respondent's argument that on June 9, it responded to the Union's requests for information by posting an update to employees on the status of negotiations, I find that the information on retirement stating, "Standard Whitesell Benefits for all Employees, Existing accounts will be maintained separately," does not adequately respond to the Union's detailed questions on the rollover of loan balances or vesting (GC Exh. 44). Moreover, the June 9 posting predates the Union's June 12 letter that informs the Respondent that it has not provided information on its questions concerning the rollover of loan balances in the proposed 401(k) plan and questions concerning vesting.

Accordingly, I find that the refusal of the Respondent to provide necessary and relevant information to the Union regarding the rollover of loan balances and vesting, violates Section 8(a)(1) and (5) of the Act.

The General Counsel alleges in paragraph 13(d) of the complaint, as amended at the hearing, that on or about June 6 the Union verbally and again on June 9 in writing, requested that Respondent provide it with information regarding which employees would immediately lose vacation time under Respondent's vacation proposal.

The past practice of the parties, as established under article 15 of their then existing collective-bargaining agreement, provides employees with a vacation entitlement based on there years of service (GC Exh. 3). Respondent's vacation proposal provides similar benefits in part but it increased the number of years of service required for certain employees to earn their vacation benefits. For example, under the old formula an employee with continuous service of 15 years would be entitled to four weeks of vacation. Under the Respondent's final contract proposal, employees could only enjoy 4 weeks of vacation after 20 years of service.

(5) Facts

During the parties June 6 bargaining session, the Union informed the Respondent that it estimated that approximately one-third of the bargaining unit would lose vacation benefits under there vacation proposal. Accordingly, Jeter requested that the Respondent provide a list of the employees along with an explanation of the impact. In addition, the Union requested information on how employees would transition from the prior practice of vacation entitlement to the new proposed formula. In the Union's June 9 written counter proposals, it requested the same information from the Respondent (GC Exh. 36).

The Respondent, prior to the commencement of negotiations, provided a seniority list to the Union that listed the dates of hire for each employee and it asserts that this would enable the Union to figure which employees would lose vacation benefits.

(6) Analysis

The Union acknowledges that they received a current seniority list from the Respondent prior to the commencement of negotiations. Based on this list, it was the Union's best estimate that one-third of the bargaining unit would be adversely impacted by the Respondent's vacation proposal. According to Jeter, and not rebutted by Wiese, when he estimated the number of employees that would be impacted Wiese stated that was close but not accurate. This was the predicate that caused the Union to request accurate information so Jeter could independently respond to each member of the bargaining unit who might inquire about their individual entitlement under the Respondent's vacation proposal.

There is no dispute that the Union was provided the seniority list prior to negotiations. However, the evidence establishes that the Respondent did not provide any information to the Union in response to their June 6 and 9 requests. Under these circumstances, and particularly noting Wiese's statement that the Union's estimate on the impact of the vacation proposal on the bargaining unit was close but not accurate, I conclude that the Respondent owed a duty to supply accurate information to the Union.

Therefore, I find that the Respondent's refusal to respond to the Union's two requests for information regarding the vacation proposal gives rise to a violation of Section 8(a)(1) and (5) of the Act.

The General Counsel alleges in paragraph 17(b) of the complaint, as amended at the hearing, that on or about August 9, the Union requested that Respondent furnish it with a copy of all postings concerning conditions of employment that Respondent posted after June 12.

(7) Facts

By letter dated August 9, Jeter informed the Respondent that Fort asked for a copy of a posting that was posted shortly after July 13 that related to conditions of employment but she was denied a copy of the posting. Jeter requested that the Union be provided with any and all postings relative to conditions of employment that have been posted since June 12 (GC Exh. 53).

By letter dated September 19, the Respondent informed the Union that all postings relative to conditions of employment since June 12 have been provided to Fort.

(8) Analysis

The General Counsel did not rebut that Fort received postings impacting on conditions of employment after June 12. In this regard, Fort did not deny in her testimony that the Union received postings relative to conditions of employment that were posted after June 12. In fact, the only testimony Fort provided on this issue concerned the refusal of the Respondent to provide the Union a copy of its work rules that were posted on the glass bulletin board.[8]

Therefore, I recommend that the allegations in paragraph 17(b) be dismissed.

The General Counsel alleges in paragraph 17(c) of the complaint, as amended at the hearing, that on or about August 9, the Union requested in writing that Respondent provide it with information regarding, among other things, the assignment of certain unit employees to work at another facility and the terms and conditions of employment that applied to those employees while working at the other facility.

(9) Facts

By letter dated August 9, Jeter informed the Respondent that the Union learned that some bargaining unit employees have been assigned duties at the old calendar factory location (GC Exh. 53). Accordingly, he requested information such as the names of the employees, the dates they were assigned such duties, the hourly pay and how the employees were selected, the duties each employee performed, whether the assignment was mandatory or voluntary, whether the employees had to provide their own transportation, and whether they would be reimbursed for the costs of such transportation to the calendar factory.

Westfall testified that employees were assigned to work at the calendar factory in July and August 2006 to put up shelves and perform other duties in anticipation of employees moving to this location in October 2006. Presently, all employees are now located in this location.

By letters dated August 30 and September 27, the Respondent notified the Union regarding the rental of the Norwood building across town and its intent of moving operations to that facility (R. Exhs. 1 and 2). In those letters, the Respondent apprised the Union that there would not be any changes in terms or conditions of employment and they intended to use existing employees to conduct as much of the equipment and materials preparation, packing and transfer as well as doing other tasks, as possible.

In another letter dated September 19, the Respondent partially replied to the Union's August 9 letter seeking information about the job duties of employees that were asked to perform certain tasks at the calendar factory (GC Exh. 31). The Respondent informed the Union that the employees were involved in installing storage racks that were within their normal job functions and were paid their regularly rate for the assignment.

(10) Analysis

Based on the above discussion, and even assuming that the reference to the calendar and Norwood buildings are the same, it is apparent to me that the Respondent did not fully respond to the requests for information that the Union made on August 9. For example, the names of the employees assigned, how they were selected and whether the assignment was mandatory or voluntary as well as information regarding transportation and reimbursement was not addressed or provided.

Under these circumstances, I conclude that the Respondent did not provide all of the information requested in paragraph 17(c) of the complaint, and therefore find that the Respondent violated Section 8(a)(1) and (5) of the Act.

3. Allegations concerning implementation of conditions of employment

The General Counsel alleges in paragraph 18(a) of the complaint that on or about June 13, Respondent implemented a policy prohibiting the Union from posting materials in the plant.

a. Facts

Fort testified that when she went to work on June 13, she observed a copy of a letter posted on one of the uncovered bulletin boards that the Respondent had faxed to her attention on June 12, after the parties completed negotiations that day (GC Exh. 57). Fort then posted a letter on the same bulletin board that summarized the status of negotiations and informed em-

[8] While Fort was not provided a copy of the Respondent's work rules, they were posted behind the glass enclosed bulletin board and were not distributed independently to employees. Thus, Fort could have read or hand copied the rules for her use. Since the record discloses that this was the only notice concerning conditions of employment that was not directly provided to the Union after June 12, the impact on conditions of employment is not *greater than* de minimis.

ployees that the Union still had not received information from the Respondent regarding their medical insurance and retirement bargaining proposals (GC Exh. 32). Shortly after Fort posted this letter, it was removed from the bulletin board.

Washington, Iowa, Plant Manager Misty Bruders testified that prior to November 2006, employees were free to post notices on the two uncovered bulletin boards without seeking permission. In November 2006, due to a notice that was posted on one of the bulletin boards that had the perception of being insensitive to certain employees, Bruders promulgated a policy that all postings without exception must be approved by her including for sale items, bake sales and menus (GC Exh. 60). Bruders admitted that this policy was undertaken without notice or bargaining with the Union.

b. Analysis

Based on Bruders testimony, it is apparent that prior to November 2006, employees had an unfettered right to post materials on the two uncovered bulletin boards and did not need to seek permission to do so. Such notices included items for sale, menus, or other matters of local interest to employees. Fort, however, was unable to conclusively establish that the Respondent was responsible for removing the June 12 letter, and the General Counsel did not call any other witnesses to establish how the letter was removed from the bulletin board. Under these circumstances, the removal of the June 12 letter cannot be attributed to the Respondent and therefore, the evidence does not support that the Respondent promulgated a policy on June 13 that prohibited the Union from posting materials in the plant.

Accordingly, I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act when it allegedly promulgated a policy on June 13, that prohibited the Union from posting materials in the plant without any advance notice or bargaining with the Union.[9]

The General Counsel alleges in paragraph 18(b) of the complaint that the Respondent, on or about June 13, announced to employees and implemented changes in their medical insurance, wage evaluation system, and 401(k) employee contribution plan.

I previously discussed the parties' positions as it concerned the evaluation system and the retirement plan. With respect to group medical insurance for employees, the Respondent proposed to utilize the plan that it presently has in place for all of its non-union employees. The Employer supplements part of the overall cost of the insurance and the employee contributes part of the cost. The Union objected to the Employer's group medical insurance plan because while part of its proposal provided free medical insurance to those employees with more than 10 years of service, it would require those employees with less than 10 years of service to increase their costs significantly. While the Union, after additional bargaining and significant evaluation, was willing to agree to the above framework, they stood firm on a gradual phase-in of the increased premium for employees with less than 10 years of service, a position that the Respondent vigorously opposed.

(1) Facts

By letter dated June 13, the Respondent acknowledged that it presented a final contract offer on June 12, and asserted that it bargained in good faith during the parties' eight collective-bargaining sessions that resulted in approximately 30 tentative agreements (GC Exh. 41). Based on the Respondent's position that a clear impasse existed, it informed the Union that consistent with its final offer that it intended to implement 20 contract articles that were specified in the letter including group insurance, wage rates that included the evaluation system, and the retirement plan that included the 401(k) plan.

(2) Analysis

Since the allegations in this paragraph are consistent and parallel to the allegations in paragraph 15(b) of the complaint, I will defer any discussion and finding until later in the decision.

The General Counsel alleges in paragraph 18(c) of the complaint that on or about June 20, the Respondent discontinued its supplemental accident fund.

(3) Facts

By letter dated June 20, the Respondent informed employees that they have been having a deduction taken out of their checks for a fund that would help supplement them in the event the employee or someone in their family would have an accident (GC Exh. 45). The fund was estimated to have in excess of $2000. The letter went on to state that the Respondent did not intend to continue the fund and that it would be calculating the amount due to each employee that participated in the fund and a check would be sent from the balance in the account.

By letter dated June 21, the Union acknowledged receipt of the Respondent's June 20 letter and warned the Employer against unilaterally discontinuing the accident fund and distributing the funds. The Union opined that the fund was a mandatory subject of bargaining and requested to bargain over the content of the June 20 letter (GC Exh. 46).

By letter dated July 11, the Respondent provided the Union with a list of the amounts distributed to current employees based on their participation in the fund (GC Exh. 47).

(4) Analysis

The Respondent acknowledges that the supplemental accident fund was part of the expired contract at article 20. 4. Under these circumstances, it was a mandatory subject of bargaining whose terms and conditions continued beyond the expiration of the collective-bargaining agreement.

Based on the forgoing discussion, it is apparent that the Respondent unilaterally discontinued the supplemental accident fund without engaging in bargaining despite the Union's timely request to do so. Moreover, the Respondent distributed the funds to participating employees without bargaining with the Union.

Under these circumstances, and in agreement with the General Counsel, I find that the Respondent violated Section 8(a)(1) and (5) of the Act.

The General Counsel alleges in paragraph 18(d) of the complaint that on or about June 29, and again on July 18, the Re-

[9] While it appears that a posting policy might have been promulgated in November 2006, no such allegation is alleged in the complaint and I decline to make a finding on this issue.

spondent failed and refused to accept and process grievances filed by the Union.

(5) Facts

On June 29, on the Union's official grievance form, Fort filed a series of grievances protesting not maintaining the status quo since June 12, on wages, vacation policy, supplemental accident insurance, union dues, seniority, overtime, and holidays (GC Exhs. 49 (a)–(f)). Although Fort signed these grievances on the line designated for the aggrieved employee, the top of the form designated the Union as the grievant.

By letter dated July 7 to Fort, the Respondent characterized the grievances as complaints and offered to discuss them if Fort wanted to pursue them further (GC Exh. 50).

By letter dated July 15, Jeter protested that the Respondent was not processing the previously filed grievances under the agreed upon procedure and was referring to them as complaints (GC Exh. 42). Jeter informed the Respondent that he expected them to follow the grievance and arbitration procedure and reply to the grievances.

On July 18, Fort filed two additional grievances signing her name in the appropriate place as the designated union official and noting on the grievance form that the Union was the grievant (GC Exhs. 51 (a) and (b)).

By letter dated July 21, the Respondent replied to the July 18 Union filing but again characterized the grievances as complaints (GC Exh. 52).

(6) Analysis

There is no disagreement that the grievances filed on June 29 and July 18 were not accepted or processed under the parties' grievance and arbitration procedure. In this regard, the Respondent's final contract offer provided to the Union on June 12 contained an article on grievances (GC Exh. 38, art. 17). In addition, counsel for the Respondent during the course of the hearing, agreed that there was a grievance procedure in effect and even if article 17 was not implemented on June 13, concedes that the expired contract grievance procedure would continue in full force and effect.

The Respondent argues that it has accepted grievances filed by the Union and points to a December 28 grievance that was filed by Fort and was processed (R. Exh. 50). The evidence shows that this was the first grievance filed since July 18.

Based on the forgoing, and particularly noting that the Respondent accepted and processed the December 28 grievance, there is no dispute that a grievance procedure was in effect after June 12. Under these circumstances, it was incumbent on the Respondent to accept and process grievances that were filed on the Union's grievance form. Since the Respondent summarily rejected eight grievances filed by the Union as described above, I find that they violated Section 8(a)(1) and (5) of the Act.

The General Counsel alleges in paragraph 18(e) of the complaint that on or about August 1, Respondent implemented changes in its attendance policy.

(7) Facts

Both Fort and Westfall testified that during their August 2006 practice performance evaluation meetings with admitted supervisor Steve Hasseltine, they were informed that a new 10-point system on attendance was in effect. In this regard, when evaluating employee attendance as part of the performance evaluation criteria, one-half point would be deducted for each missed day.

(8) Analysis

The Respondent did not dispute that the point system was implemented as part of there performance evaluation system. Likewise, the Respondent offered no evidence that the Union was notified in advance of this change or given an opportunity to negotiate about the attendance policy.

Therefore, in the absence of notice and an opportunity to negotiate, the Respondent's action in unilaterally changing the attendance policy, is violative of Section 8(a)(1) and (5) of the Act.

4. Was there a bona fide impasse

In *Bottom Line Enterprises,* 302 NLRB 373 (1991), the Board held that during negotiations, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse had been reached in bargaining as a whole."

In *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists, AFTRA v. NLRB,* 395 F.2d 622 (D.C. Cir. 1968), the Board defined an impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." See also *Newcor Bay City Division,* 345 NLRB 1229, 1238 (2005). This principle was restated by the Board in *Hi-Way Billboards, Inc.,* 206 NLRB 22, 23 (1973), enf. denied on other grounds 500 F.2d 181 (5th Cir. 1974), as follows:

> A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

The burden of demonstrating the existence of impasse rests on the party claiming impasse. The question of whether a valid impasse exists is a "matter of Judgment" and among the relevant factors are "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.,* supra at 478.

I find that the Respondent has not met its burden to establish a valid impasse. In this regard, the Respondent imposed an arbitrary and unreasonable deadline for the completion of negotiations for a new collective-bargaining agreement and did not exhaust the collective-bargaining process. First, I note that the Respondent set the tone for the negotiations from there inception, and was in a rush to reach an agreement on or before the expiration of the parties' collective-bargaining agreement on June 12. Indeed, at the initial bargaining session on May 26, the Respondent informed the Union that it intended to present a final contact offer on June 8 or 9. Second, on June 8, both chief negotiators agreed that the parties were not at impasse. Third,

the Union on June 9, requested a contract extension until July 16 but this was rejected by the Respondent. It is noted that the Respondent never gave any reasons to the Union for rejecting this request and never revealed any economic exigencies that required it to complete negotiations on or before June 12. Fourth, it is not disputed that this was the initial collective-bargaining agreement to be negotiated between the parties. In fact, the Respondent informed the Union at the outset of negotiations that it intended to make numerous changes in their existing agreement. Thus, it is inconceivable that impasse was declared on June 12, after eight collective-bargaining sessions that consumed approximately 52 hours of negotiations, much of which was taken up by caucuses between the parties (GC Exh. 2). Lastly, while I note that the parties appeared to have real disagreements on a number of subjects including seniority, the disciplinary standard to be used in arbitrations, overtime, vacations, the merit pay system, the retirement plan and group insurance, the Union and the Respondent not only reached 30 tentative agreements during the course of bargaining but also reached agreements and exchanged counterproposals as late as June 11. For example, even on June 11, the parties reached agreement on a dues-checkoff procedure (art. 11); Personal Protective Equipment (art. 23); Strike and Lockout (art. 6); and Bereavement Pay (art. 15). Likewise, the Respondent made a counterproposal to the Union on leave of absence and sick leave, a proposal on voluntary layoff, and counterproposals on wages, vacations, and holidays. The Union also showed movement by reducing its wage proposal in the second and third year of the proposed contract. Therefore, I find that the Respondent did not give enough time for the Union to consider these counterproposals before declaring impasse on June 12.

For all of these reasons, I am of the opinion that the Respondent did not reach a bona fide impasse but rather rushed to judgment in an effort to unilaterally implement its final contact offer on June 12, including the provisions alleged in paragraph 18(b) of the complaint.[10]

I am also in agreement with the General Counsel's argument that under the Board's holding in *Decker Coal,* 301 NLRB 729 (1991), the Respondent's failure to provide necessary and relevant information precluded impasse, and therefore, prevented lawful implementation of a final contract offer. Indeed, the refusal of the Respondent to specifically provide layoff and recall, employee evaluation, wage rate, vacation, and retirement plan information to the Union directly impacts on the core issues separating the parties in this case. See *Caldwell Mfg. Co.,* 346 NLRB 1159 (2006).

Based on the forgoing, I find that the Respondent has failed to meet its burden of establishing the existence of a valid impasse. Accordingly, the Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally implemented the provisions of its final contract offer on June 12,[11] refused to provide necessary and relevant information to the Union that was requested prior to the expiration of the parties' collective-bargaining agreement, and without first providing notice to the FMCS of the existence of a dispute.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by prohibiting an employee from distributing Union meeting notices in the plant during the employee's unpaid and breaktime and by promulgating a policy prohibiting employees from posting any Union materials in the plant.

4. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by refusing to furnish the Union with necessary and relevant information regarding layoff and recall, the criteria used in evaluating employees and how wage rates would be determined, vesting and the ability of employees to rollover loan balances under the retirement plan, the assignment of certain unit employees to work at another facility, by eliminating its supplemental accident fund and ceasing dues checkoff, by implementing changes in medical insurance, the wage evaluation system and the 401(k) plan, by failing and refusing to accept and process grievances filed by the Union, by implementing changes in its attendance policy, by unilaterally implementing its final contract offer without first providing notice to the FMCS, and unilaterally implementing on June 13, 2006, its final contract offer without having exhausted the collective-bargaining process and without having reached a bona fide impasse in negotiations and without the Union's consent.

5. Respondent did not violate Section 8(a)(1) of the Act by denigrating a union representative or threatening that bargaining was futile and did not threaten employees that the plant may not remain in Washington, Iowa, if they continued to support the Union.

[10] While I have found that the Respondent implemented its final contact offer without having reached a bona fide impasse (see par. 15(b) of the complaint and Janowitz' June 13 letter to Jeter for the specific provisions that were implemented), I reject the General Counsel's position that the Respondent engaged in surface bargaining which lead to and caused the unlawful impasse. In this regard, the parties' met face to face for eight bargaining sessions, reached agreement on approximately 30 tentative contract articles, exchanged numerous counterproposals on agreed upon open issues and were legitimately deadlocked on a number of mandatory subjects of bargaining. Thus, I do not find that the Respondent engaged in dilatory tactics and refused to negotiate with the Union for an initial collective-bargaining agreement. Therefore, I do not find that the Respondent maintained a state of mind inconsistent with a willingness to reach a genuine agreement. *People Care, Inc.* 327 NLRB 814, 826–827 (1999). Additionally, I find merit in the General Counsel's allegation in the complaint that the Respondent failed to bargain in good faith by ceasing to deduct union dues on and after June 12. The Board has held that an employer's dues-checkoff obligation terminates at contract expiration. *Hacienda Resort Hotel & Casino,* 331 NLRB 665, 667 (2000). However, in the particular circumstances of this case, the Respondent was obligated to maintain the checkoff provisions at least until 30 days after it gave appropriate 8(d)(3) notices. Based on my above finding that the Respondent failed to timely give notice to the FMCS, a make-whole remedy for authorized dues not deducted is proper. *Petroleum Maintenance Co.,* 290 NLRB 462 (1988).

[11] See *Day Automotive Group,* 348 NLRB 1257, 1269–1271 (2006).

6. Respondent did not violate Section 8(a)(1) and (5) of the Act by refusing to furnish the Union with a copy of all postings concerning conditions of employment that Respondent posted after June 12, 2006, or by implementing a policy on June 13, 2006, prohibiting the Union from posting materials in the plant.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent unilaterally implemented its final contract offer on June 13, 2006, without first providing notice to the FMCS, without first providing the Union with requested information and without having reached a bona fide impasse in negotiations, I shall order it to cease and desist from engaging in such conduct, return to the status quo, and to bargain on request with the Union about these matters. In regard to the wage increases and the other unilateral changes, the Union may use its discretion as to whether the changes should be rescinded. The Respondent shall also make whole any employee for any loss of earnings and other benefits suffered as a result of its unlawful action. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest to be computed in the manner set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). The Respondent shall rescind and remove from employees' files all discipline issued to them as a result of Respondent's unilateral implementation of the attendance policy and make employees whole for any loss they may have suffered as a result of such discipline in the manner set forth in the above cases. Finally, Respondent shall be ordered to give effect to all of the existing terms and conditions of employment of the expired collective-bargaining agreement until, on request of the Union, it bargains in good faith and a new agreement or a valid impasse is reached.[12]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Whitesell Corporation, Washington, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing terms and conditions of employment of our employees by implementing provisions of our final contract offer on June 13, 2006, without having first bargained with the Union in good faith to impasse, implementing changes in its medical insurance, wage evaluation system and 401(k) plan, discontinuing its supplemental accident fund and the withholding of dues, refusing to accept and process grievances filed by the Union, implementing a policy prohibiting the Union from posting materials in the plant, and implementing changes in its attendance policy.

(b) Refusing to negotiate with the Union over mandatory subjects of collective bargaining.

(c) Prohibiting employees from distributing union meeting notices in the plant during the employee's unpaid or breaktime.

(d) Refusing to provide necessary and relevant information to the Union.

(e) Implementing provisions of its final contract offer on June 13, 2006, without first providing notice to the FMCS.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees concerning terms and conditions of employment and provide necessary and relevant information to the Union.

(b) Rescind, at the Union's discretion, the changes in wages, hours, and other terms and conditions of employment unilaterally implemented on June 13, 2006, return to the status quo, and negotiate with the Union in good faith until we reach a bona fide impasse after bargaining in good faith.

(c) Make any employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Reimburse the Union for all membership dues which the Respondent failed to withhold and transmit the dues to the Union pursuant to the employee's signed dues-deduction authorizations with interest.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Washington, Iowa, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees

[12] Contrary to the General Counsel, I decline to grant its request to require the Respondent to pay the Union its expenses incurred in the subject collective-bargaining negotiations. In this regard, the parties reached numerous tentative agreements including a grievance and arbitration procedure and dues-checkoff provisions, and for the most part negotiated in good faith with an intention of trying to reach an agreement. *Waterbury Hotel Management LLC,* 333 NLRB 482 (2001) (denying costs where "[t]he Respondent's defenses, although generally meritless, were debatable rather than frivolous and therefore do not warrant the extraordinary remedy requested"], enfd. 314 F.3d 645 (D.C. Cir. 2003).

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2006.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 2, 2007

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union as the exclusive bargaining representative of our employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed at its plant in Washington, Iowa, excluding office and clerical employees, salesmen, professional employees, guards, supervisory and managerial employees as defined in the National Labor Relations Act.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees without having first bargained with the Union in good faith to a bona fide impasse.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees without prior notice to the Union and without affording the Union an opportunity to bargain.

WE WILL NOT refuse to bargain with the Union by failing to give notice of the existence of any dispute between ourselves and the Union to the Federal Mediation and Conciliation Service (FMCS) as required by Section 8(d) (3) of the Act and by failing to continue in full force and effect all the terms and conditions of our existing agreement.

WE WILL NOT refuse to negotiate with the Union over mandatory subjects of collective bargaining.

WE WILL NOT prohibit employees' from distributing union meeting notices in the plant during the employee's unpaid or break time nor will we promulgate a policy prohibiting the Union or employees from posting any union materials in the plant.

WE WILL NOT refuse to provide necessary and relevant information to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees concerning terms and conditions of employment.

WE WILL rescind, at the Union's discretion, the changes in wages, hours, and other terms and conditions of employment unilaterally implemented on June 13, 2006, and negotiate with the Union in good faith until we reach an agreement or a valid impasse after bargaining in good faith.

WE WILL make any employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL provide the Union information that is necessary and relevant for the bargaining process.

WE WILL, on request, process any grievances filed by the Union.

WE WILL reimburse the Union for all membership dues which we failed to withhold and transmit the dues pursuant to the employee's signed dues deduction authorizations, with interest.

WHITESELL CORPORATION